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CONGRESS INTENDED, LEAVE COMPETITION CONCERNS TO ANTITRUST**

Reply Comments of

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In the Matter of the Expanding the Economic and Innovation
Opportunities of Spectrum Through Incentive Auctions

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FCC SHOULD CONDUCT OPEN SPECTRUM AUCTIONS AS CONGRESS INTENDED, LEAVE COMPETITION CONCERNS TO ANTITRUST

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Over the last several years, America's wireless industry has become the world leader in high-speed mobile service. The key to this success has been the availability of spectrum to meet exploding consumer demand for data service. Yet, in the first round of comments in this proceeding, several wireless companies and advocacy groups urged the FCC to cap how much low-frequency spectrum any one company can own.² This amounts to barring AT&T and Verizon, currently the two largest holders of low-frequency spectrum, from buying more spectrum licenses in the upcoming "incentive auction" solely because they already have "too much" spectrum. These companies are investing considerable capital into next-generation networks, and prices for consumers have continued to fall even as the industry has grown more concentrated. The argument for spectrum caps rests on the assertion that concentration of spectrum leads to anticompetitive behavior, yet there is no evidence for this claim. In fact, there are serious negative consequences to forbidding AT&T and Verizon from participating in the auction: it would harm their subscribers by preventing the two companies from providing the capacity their current, and future, customers demand.

Auctions have been the key to the success for the wireless sector by allowing spectrum to go to where it is most in demand. The industry has thrived without spectrum caps and without the FCC limiting who may participate in spectrum auctions, while competition concerns have been addressed by antitrust enforcement, and deterred by the threat thereof. Changing the regulatory landscape now only risks damaging one of the most successful sectors of our economy. Excluding these companies from the auction would not only damage the future of one of fastest-growing sectors of the economy, it would also frustrate the clear intent of Congress to maximize participation in the auction in order to:

1. Ensure that spectrum is allocated to its highest valued use,
2. Maximize revenue for the Treasury—a key priority at a time of intense fiscal pressure, and
3. Maximize revenue for public safety needs.

Consistent with these goals, the FCC should:

1. Conduct an unrestricted auction and allow the DOJ to address competition concerns by policing of the market, should real anticompetitive conduct occur, under antitrust law, or, failing that,

¹ TechFreedom is a non-profit, non-partisan technology policy think tank. Starr & Szoka have written and commented extensively on these issues. They can be reached at contact@techfreedom.org.

² See Comments of Sprint, In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions (Jan. 25, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022112071>; Comments of T-Mobile, In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions (Jan. 25, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022112404>; Comments of The Public Interest Spectrum Coalition (Jan. 25, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022112381>.

2. Limit the total amount of spectrum any one company may hold only insofar as can be justified under the same substantive standards of antitrust law that the DOJ would apply, which means:
 - a. Refusing to impose any form of a hard spectrum cap,
 - b. Rejecting the suggestions made by Free Press³ to create a spectrum screen with the veneer of antitrust's analytical rigor (*i.e.*, applying the Herfindahl-Hirschman Index (HHI), itself an outdated analytical shortcut, to shares of spectrum rather than market shares), and instead,
 - c. Conducting a holistic assessment of the competitiveness of the wireless market, using on a "rule of reason" analysis and a consumer harm standard that considers the potential consumer benefits of concentrated spectrum holdings.

Congress Wanted Open Auctions

While imposing a cap on low-frequency spectrum holdings does not, on its face, preclude participation in the incentive auctions, that is precisely the result it will have. Both Sprint and T-Mobile have called for caps that prevent any company from holding $\frac{1}{3}$ of the available spectrum below 1 GHz in any market, but AT&T and Verizon already hold a combined 75% of available low-frequency spectrum nationwide and 86% in the top 10 U.S. markets.⁴ Under the proposed caps, they would effectively be forbidden from acquiring any spectrum in the incentive auction since, conveniently, all of the spectrum available in the auction will be below 1 GHz.

The FCC has a history of placing limits on auctioned spectrum, and it's difficult to imagine that the results of the D Block auction in 2008, in which no spectrum was sold because the reserve price was not met,⁵ did not influence Congress this time around. The Spectrum Act required the FCC not to exclude any eligible parties from purchasing spectrum in the incentive auction. Thus, a rule that disqualifies AT&T and Verizon from participating would contravene Congress's intent. Section 6404 of the Act provides:

the Commission may not prevent a person from participating in a system of competitive bidding under this subsection if such person--

- (i) complies with all the auction procedures and other requirements to protect the auction process established by the Commission; and
- (ii) either—
 - (I) meets the technical, financial, character, and citizenship qualifications that the Commission may require under section 303(l)(1), 308(b), or 310 to hold a license; or

³ See Comments of Free Press, In the Matter of Policies Regarding Mobile Spectrum Holdings (Nov. 28, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022068025>.

⁴ See Comments of Sprint, at 2.

⁵ See Federal Communications Commission, Factsheet for Auction 73: 700 MHz Band, http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=73 ("The provisionally winning bid for the D Block license, however, did not meet the applicable reserve price and thus did not become a winning bid.").

(II) would meet such license qualifications by means approved by the Commission prior to the grant of the license.⁶

This section clearly expresses Congress's intent that the FCC should maximize participation in "competitive bidding" by not excluding eligible licensees. If this section is to be given any meaning, it must be understood as a strict limitation on the FCC's ability to close the auction to certain participants. To hold otherwise would violate the basic statutory canon against surplusage.⁷ If Congress had felt confident in the Commission's ability to conduct this auction without Congressional guidance, they would have left the Act as is and allowed the FCC to conduct the incentive auctions as they do all other spectrum auctions. The two exceptions provided cannot be read to swallow this rule. Subsection (i) (to "to protect the auction process") does not imply a power to shape the auction outcomes by picking winners and losers or trying to design the shape of the market. Congress does not "hide elephants in mouse holes."⁸ The exception provided in subsection (ii) is, if anything, further evidence of Congress's intent to maximize participation in the auction, since it allows the FCC to establish a process by which a party that is not yet qualified to be an FCC may participate in the auction and establish its qualifications between the time the auction is conducted and the time the resulting licenses are actually awarded.

Additionally, one of Congress's primary motivations in passing the Spectrum Act was to add a new revenue stream for the federal government. The money raised in the auction will be put towards "the Public Safety Trust Fund to fund a national first responder network, state and local public safety grants, public safety research, and national deficit reduction."⁹ Thus one of the FCC's goals in crafting the rules for the incentive auction is to find a way to maximize revenues received in the auction. Excluding Verizon and AT&T from participating in the auction would likely reduce auction revenues and contravene Congressional intent. If they are not able to participate in the auction, the available licenses are unlikely to bring in as much revenue for the federal government as they would have otherwise.¹⁰

Without AT&T and Verizon participating in the auction, Sprint and T-Mobile would be, by far, the two largest participating wireless providers,¹¹ so it's no surprise that they are advocating for caps on spectrum below 1 GHz to keep AT&T and Verizon out of the auction. Not only would they find

⁶ 47 U.S.C. § 309(j)(17) (2006).

⁷ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

⁸ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

⁹ *In re Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, ¶ 26, (Oct. 2, 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-118A1.pdf ("Incentive Auction NPRM").

¹⁰ See Statement of Commissioner Ajit Pai, Hearing Before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce, "Keeping the New Broadband Spectrum Law on Track," Dec.12, 2012, <http://www.fcc.gov/document/commissioner-pai-statement-hearing-broadband-spectrum-law>.

¹¹ As of March 31, 2012, Sprint had nearly 56 million subscribers, T-Mobile had just over 33 million subscribers, and the next largest wireless provider (excluding Clearwire, who is 51% owned by Sprint), MetroPCS, has only 9.5 million subscribers. See Fierce Wireless, *Grading the Top 10 U.S. Carriers in the First Quarter of 2012*, <http://www.fiercewireless.com/special-reports/grading-top-10-us-carriers-first-quarter-2012>.

themselves with an outstanding financial advantage over all of the other bidders, but with AT&T and Verizon out of the way, they could acquire spectrum at below-market rates. Sprint and T-Mobile put forward numerous pro-competitive benefits to the low-frequency spectrum cap, but the reality of the situation is that if such a cap is imposed, these two companies are likely to end up with most, if not all, of the spectrum from the incentive auction. It has become a truism that the FCC should not be in the business of picking winners and losers, yet that is precisely what imposing a cap on low-frequency spectrum would do. It would empower the FCC to pick winners in the wireless industry.

The Benefits of Low-Frequency Spectrum Have Been Overstated

Those advocating spectrum caps have consistently overstated the benefits of the sub-1 GHz spectrum at issue here. To be sure, low-frequency spectrum does have one clear advantage for wireless providers over higher-frequency spectrum: greater range.¹² Thus, it takes fewer towers to cover an area with low-frequency spectrum than it would to cover the same area with high-frequency spectrum.¹³ This is an advantage but it has been overstated: In today's wireless market, coverage is not nearly as important as capacity, and so the advantages of low-frequency spectrum have started to erode in today's market, particularly in highly-concentrated areas where spectrum is needed most.

In America today, there are currently four nationwide wireless providers alongside dozens of regional providers. According to the FCC's most recent Wireless Competition Report, 94.3% of the population is covered by four or more providers, and 76.4% is covered by six or more.¹⁴ In short, competition is robust and consumers have choices. In most of the country there is not a pressing demand for more wireless coverage, simply better wireless coverage. But more coverage is what low-frequency spectrum provides: it affords new wireless providers and entrants into new markets the ability to build out their networks more quickly and inexpensively. There are obviously benefits to this, but low-frequency spectrum gives wireless providers little-to-no advantage over high-frequency in supplying customers with what they really need today: capacity.

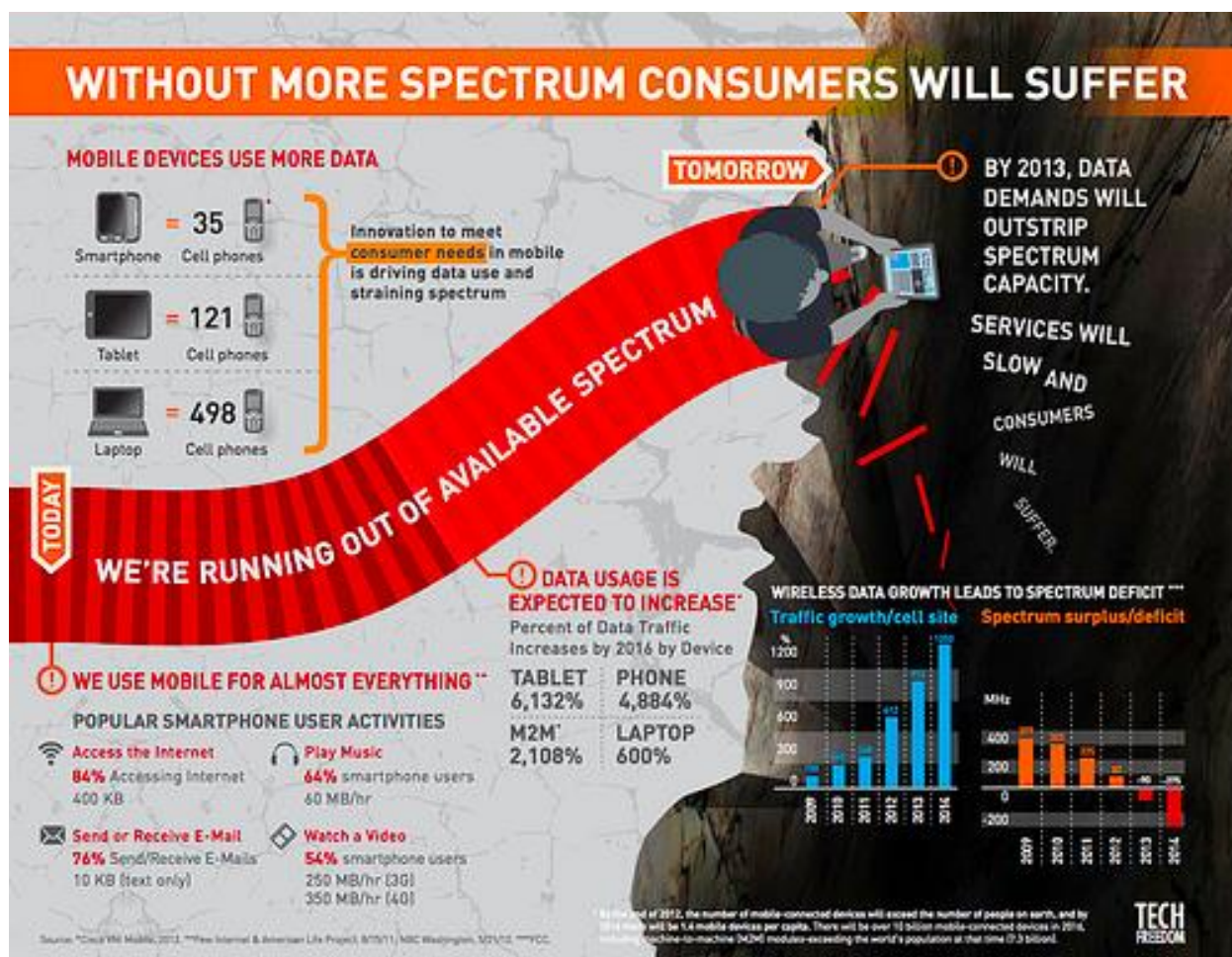
Spectrum is so sorely needed today because the demand for data is skyrocketing, and wireless providers' current spectrum holdings won't be able to meet the consumer demands of the near future. This need is nowhere more acute than in highly-concentrated population centers like New York and San Francisco, where dropped call rates have already reached 30%¹⁵ and data speeds sometimes grind to a near-halt. These networks do not have enough spectrum to provide the capacity consumers demand.

¹² See FCC, Fifteenth Mobile Wireless Competition Report, ¶ 292, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A1.pdf.

¹³ *Id.* ¶ 293.

¹⁴ *Id.* ¶ 44.

¹⁵ Matt Buchanan, *Apple Genius Bar: iPhones' 30 Percent Call Drop Is "Normal" in New York*, *Gizmodo* (Sep. 29, 2012), <http://gizmodo.com/5370493/apple-genius-bar-iphones-30-percent-call-drop-is-normal-in-new-york>.



Low-frequency spectrum's advantages in providing coverage offer no particular advantage in solving the capacity problem--indeed, the contrary may be true. When capacity, not coverage, becomes a provider's goal, its network will require the same number of towers for its coverage area regardless if the spectrum being used is low-frequency or high-frequency spectrum.¹⁶ So the primary advantage of low-frequency spectrum (the need for fewer towers) disappears when building a wireless network in places where network capacity is paramount, like New York, Chicago or Washington, DC. Capacity, not coverage, is the key to our wireless future. And in this respect, high-frequency spectrum has its advantages, as the FCC itself has observed: "capacity enhancement technologies such as multiple-input and multiple-output (MIMO) may perform better at higher frequencies."¹⁷ MIMO allows wireless providers to get more efficient use of their spectrum by placing more antennas on transmitters and receivers "without requiring added bandwidth or drawing additional power."¹⁸

The advantages that low-frequency spectrum provides simply are not significant enough to treat it differently from spectrum above 1 GHz. There is no reason that the FCC should have a separate

¹⁶ See FCC's Fifteenth Report, ¶ 296.

¹⁷ *Id.*

¹⁸ Andrew Tarantola, *What Is MIMO?*, Gizmodo (Sep. 6, 2012), <http://gizmodo.com/5941066/what-is-mimo>.

spectrum holdings analysis for low-frequency spectrum. The Commission should not impose a cap on spectrum holdings of any sort, low-frequency or high-frequency. A cap created with the purpose of keeping AT&T and Verizon out of the incentive auction would be premised on the misguided theory that concentration of spectrum alone leads to anticompetitive behavior. This sort of *ex ante* intervention into a complex market runs a high likelihood of making a mistake in predicting the future of the wireless industry. It's an effort to predict anticompetitive behavior before it happens without all of the information necessary to do so.

Ideally, the FCC would refrain from conducting any sort of competitive analysis post-auction and leave any competition concerns in the hands of the DOJ, who could intervene under the antitrust laws after real anticompetitive conduct has occurred. But if the FCC is to remain in the business of reviewing spectrum holdings after an auction, they should apply a "rule of reason" antitrust-style analysis, as we proposed in our Comments in the Mobile Spectrum Holdings docket.¹⁹ Contrary to an *ex ante* scheme, a rule of reason approach provides regulators with sufficient information that allows them to intervene when truly necessary. Specifically, this means that the FCC should:

- Refrain from relying on the outdated 'structural presumption' that high levels of concentration in a market leads to anticompetitive prices and harm to consumers.
- Instead, focus on the goal of ensuring that sufficient spectrum and the investment necessary to deploy it are available for consumer use.
- Apply a consumer harm standard when evaluating spectrum acquired at auction to determine if the anticompetitive effects of the acquisition outweigh their likely procompetitive benefits.
- Abandon its focus on the percentage of spectrum held by a company and replace it with a system that evaluates how increased spectrum holdings actually affect consumers.
- Include in their analysis the potential benefits to consumers from expanded rather than contracted network holdings such as the ability of a wireless provider to meet its customers' future data demands.

Both a *per se* rule on spectrum holdings and Free Press's flawed "antitrust analysis" would deny AT&T and Verizon's subscribers the capacity benefits of greater spectrum. Allowing Verizon and AT&T to acquire more spectrum simply means allowing them to serve their customers better. Denying them this opportunity means denying their customers greater capacity. These companies already do not have enough spectrum to meet the current demand for data in some areas, let alone enough to allow them to improve their service to handle future demand. By contrast, a rule of reason analysis to evaluating spectrum holdings would take consumer benefits into account.

¹⁹ Comments of TechFreedom, In the Matter of Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269, 10 (Nov. 28, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022068538>.

Conclusion

Commissioner Pai put it best when he said, in Congressional testimony in December about “Keeping the New Broadband Spectrum Law on Track:”

We need robust participation from television broadcasters, current wireless operators, and new entrants. The more people at the party, so to speak, the better the party will be. But if ... the Commission starts picking and choosing who may participate in the forward auction—such as by setting a spectrum cap or narrowing the spectrum screen despite the robust competition in the wireless market—it will result in less participation, less revenue, less spectrum available for mobile broadband, and less funding for public safety.²⁰

An open auction is essential for the future of America’s wireless industry. If it can actually be demonstrated that spectrum concentration leads to anticompetitive behavior, true antitrust principles, not *ex ante* spectrum caps, provide the best remedy.

²⁰ Statement of Commissioner Ajit Pai, *supra* note 9.